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No. 95-88

In the Supreme Court of the United States

OCTOBER TERM, 1995

JESSE A. EDWARDS, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 114 of the Civil Rights Act of 1991, 42 U.S.C. 2000e-16 (Supp. V 1993), which authorizes interest awards against the federal government in Title VII actions, should be applied retroactively to award prejudgment interest on petitioner's back pay award which was entered before the effective date of the Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	8
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Brown v. *Marsh*, 868 F. Supp. 15 (D.D.C. 1994), appeal pending, Nos. 95-5026, 95-5048 (D.C. Cir.)	5, 7-8
Brown v. *Secretary of Army*, 918 F.2d 214 (D.C. Cir. 1990), cert. denied, 502 U.S. 810 (1991)	4
Estate of Reynolds v. *Martin*, 985 F.2d 470 (9th Cir. 1993)	7
Huey v. *Sullivan*, 971 F.2d 1362 (8th Cir. 1992), cert. denied, 114 S. Ct. 1642 (1994)	7
Landgraf v. *USI Film Products*, 114 S. Ct. 1483 (1994)	4, 5, 6
Library of Congress v. *Shaw*, 478 U.S. 310 (1986)	3, 6, 7
Rivers v. *Roadway Express, Inc.*, 114 S. Ct. 1510 (1994)	4
Woolf v. *Bowles*, 57 F.3d 407 (4th Cir. 1995)	6-7

Statutes and regulations:

Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*:	
29 U.S.C. 623(a)	2
29 U.S.C. 623(d)	2
Back Pay Act, 5 U.S.C. 5596	4
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*	2

Statutes—Continued: Page

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 3
§ 102, 105 Stat. 1072-1074 ..... 6, 8
§ 114, 105 Stat. 1079 ..... 3, 4, 5, 8
42 U.S.C. 2000e-16(d) (Supp. V 1993) 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 40 F.3d 1152. The district court's opinion on liability (Pet. Supp. App. 1-16) is reported at 738 F. Supp. 426, but its order concerning remedies (App., *infra*, 1a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1994. The petition for a writ of certiorari was filed on February 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, an employee of respondent United States Department of the Interior since 1976, filed suit in the United States District Court for the District of Colorado, alleging that respondent discriminated against him on the basis of race and age by failing to promote him and by retaliating against him, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act, 29 U.S.C. 623(a) and (d) (ADEA). Pet. Supp. App. 1-2. Following a trial, the district court rejected petitioner's ADEA and retaliation claims, *id.* at 11-12, but found that respondent had discriminated unlawfully against petitioner on the basis of race, *id.* at 9-11.

In its May 29, 1990, order entering judgment for petitioner under Title VII, the district court ordered that petitioner be given a retroactive promotion with back pay and other benefits. Pet. Supp. App. 14-15. The court directed the parties to submit additional information to the court concerning the amount due petitioner and any further remedies. *Ibid.* After a hearing on the remaining remedial issues, the court issued a final order on remedies on May 9, 1991. App., *infra*, 1a-11a. In that order, the court incorporated the parties' consent decree, ordered back pay and attorney's fees with post-judgment interest, and awarded petitioner other equitable relief. The court denied petitioner's request for prejudgment interest. *Ibid.*

Neither party appealed from the district court's liability determination, but both parties appealed from the court's remedial order. Petitioner sought review of the district court's failure to award prejudgment

interest and its failure to order that a particular job vacancy be reopened. Respondent sought review of the awards of post-judgment interest. Gov't C.A. Br. 6.

2. On November 21, 1991, while the case was pending before the court of appeals, the Civil Rights Act of 1991 went into effect. Pub. L. No. 102-166, 105 Stat. 1071. Section 114 of the Act authorizes interest awards against the United States under Title VII. 105 Stat. 1079 (codified at 42 U.S.C. 2000e-16(d) (Supp. V 1993). Section 114 provides that in Title VII cases against the United States, "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." *Ibid.* The Act thereby changed the rule announced in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), to the extent the Court had held that in a Title VII suit against a federal defendant, the plaintiff could not recover interest on the attorney's fees awarded by the court.

3. The court of appeals modified the judgment and affirmed. Pet. App. 1-8. The court rejected petitioner's argument that the district court erred in refusing to reopen a vacancy announcement, Pet. App. 7-8, and it ruled on three questions regarding awards of interest against the United States.

First, the court held that under *Library of Congress* v. *Shaw*, 478 U.S. 310, 314 (1986), petitioner was not entitled to interest on his attorney's fees award because the United States is immune from interest awards "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit." Pet. App. 4, quoting *Shaw*, 478 U.S. at 314. No such congressional waiver existed at the time judgment was

entered in this case. Pet. App. 4. The court noted, however, that Section 114 of the Civil Rights Act of 1991 subsequently amended Title VII to allow interest on awards against the government. Pet. App. 4 n.3.[1] The court concluded, however, that the rationale set forth in *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483 (1994), and *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. 1510 (1994), supporting the presumption against retroactive application of other provisions of the Civil Rights Act of 1991, supports a presumption against retroactive application of Section 114 as well. Pet. App. 4 n.3. The court therefore modified the judgment to vacate the award of interest on the attorney's fee award. *Id.* at 8.

Second, the court affirmed the district court's denial of prejudgment interest on petitioner's back pay award. Pet. App. 5-7. It rejected petitioner's argument that the Back Pay Act, 5 U.S.C. 5596, constituted a waiver of sovereign immunity for prejudgment interest on the Title VII back pay award in this case. Like the district court, the court of appeals adopted the reasoning of *Brown* v. *Secretary of Army*, 918 F.2d 214, 216 (1990), cert. denied, 502 U.S. 810 (1991), in which the District of Columbia Circuit held that the coverage of the Back Pay Act, as amended in 1978, is limited to back pay awards "stemming from the unlawful 'withdrawal or reduction' of compensation," including "illegal refusals to make mandatory promotions," but does not cover competitive or discretionary promotions. Pet. App. 6-

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[1] Due to an apparent typographical error, the footnote in the petition appendix is identified as footnote 3, whereas the footnote is identified as footnote 1 in the opinion as reported. See 40 F.3d 1152, 1154 n.1.

7. Because petitioner's case involved competitive and discretionary promotions, the court concluded that the case was not covered by the Back Pay Act and affirmed the denial of prejudgment interest on the back pay award. *Id.* at 7.

Finally, the court of appeals reversed the district court's award of post-judgment interest because it was not based on a congressional waiver of sovereign immunity. Pet. App. 7.

ARGUMENT

Petitioner contends (Pet. II) that the court of appeals' opinion conflicts with *Brown* v. *Marsh*, 868 F. Supp. 15 (1994), appeal pending, Nos. 95-5026, 95-5048 (D.C. Cir.) (Pet. App. 9-18), in which the District of Columbia District Court applied Section 114 of the Civil Rights Act of 1991 retroactively to award interest on attorney's fees in a Title VII case that was pending when Section 114 went into effect.[2] Petitioner asserts that if the government does not have immunity against payment of interest on attorney's fees, it does not have immunity against payment of interest on the back pay award at issue in this case. Pet. II.

In *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483 (1994), the Court held that where a newly enacted statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct,

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[2] Petitioner relies solely on *Brown* v. *Marsh* and challenges neither the court of appeals' rejection of the Back Pay Act as a justification for a prejudgment interest award on his back pay nor the court's denial of post-judgment interest. Petitioner also does not raise any issue arising out of the denial of interest on his attorney's fees. See Pet. ii, I-II.

or impose new duties with respect to transactions already completed," it cannot be applied retroactively "absent clear congressional intent favoring such a result." 114 S. Ct. at 1505. The *Landgraf* Court therefore held that Section 102 of the Civil Rights Act of 1991, 105 Stat. 1072-1074, which authorized punitive damage awards against private defendants and compensatory damage awards against defendants generally in Title VII cases, should not be applied retroactively. The Court explained that Section 102 would

> undoubtedly impose on employers found liable a new disability in respect to past events. The *extent* of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored.

114 S. Ct. at 1507 (internal quotation marks and citation omitted) (emphasis in original).

Prior to the enactment of Section 114, the federal government was immune from paying interest on Title VII awards for the type of discriminatory action involved here. *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). By waiving sovereign immunity with respect to interest on such awards, Section 114 expanded the rights of prevailing plaintiffs in Title VII cases, thereby increasing the extent of the government's liability. The Fourth Circuit held in another recent back pay case that Section 114

> is subject to *Landgraf*'s rule of nonretroactivity: requiring the federal government to pay interest would disrupt the longstanding expectation created by the no-interest rule, and thus un-

> questionably would impose an important new legal burden on the federal government.

Woolf v. *Bowles*, 57 F.3d 407, 410 (1995). Thus, the Fourth Circuit has reached the same conclusion as the court of appeals below. *Ibid.*; see also *Huey* v. *Sullivan*, 971 F.2d 1362, 1365 (8th Cir. 1992) (pre-*Landgraf* ruling that Section 114 of 1991 Act does not apply retroactively to interest on back pay), cert. denied, 114 S. Ct. 1642 (1994); but see *Estate of Reynolds* v. *Martin*, 985 F.2d 470 (9th Cir. 1993) (pre-*Landgraf* decision based on reasoning expressly rejected in *Landgraf*). Petitioner does not allege any conflict among the courts of appeals on this matter after *Landgraf*.

The single district court case, *Brown* v. *Marsh*, on which petitioner relies is inconsistent with *Landgraf*.[3] In *Brown* v. *Marsh*, the district court held that Section 114 could be applied retroactively with respect to interest on attorney's fees because awarding interest on attorney's fees affects only "collateral" rights of the parties, not the parties' substantive rights. This Court has held, however, that interest on monetary awards against the United States is an additional element of damages traceable to the underlying unlawful conduct at issue. See *Shaw*, 478 U.S. at 314.

Petitioner seeks an award of interest on a back pay award rather than interest on attorney's fees. Under the *Brown* court's approach, interest on a back pay award would not be characterized as affecting only

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[3] The government's appeal in *Brown* is currently pending in the District of Columbia Circuit. D.C. Cir. Nos. 95-5026, 95-5048.

"collateral" rights of the parties because a back pay award is not "uniquely separable from the cause of action to be proved at trial," 868 F. Supp. at 18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1995

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 85-C-2444

JESSE E. EDWARDS, PLAINTIFF

v.

MANUEL C. LUJAN, JR., ET AL., DEFENDANTS

[Filed May 9, 1991]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

CARRIGAN, J.

This action was filed pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 623(a) and (d). Plaintiff, Jesse A. Edwards, claimed that the defendant, United States Department of Interior, Minerals Management Service, failed to promote him: (1) because he is Black; (2) because he is over forty years old; and (3) in retaliation for protected

EEO activity. MMS is an employer within the meaning of 42 U.S.C. § 2000e(b).

The matter was tried to the court in April 1990, and on May 29, 1990, a judgment was entered for the plaintiff on his Title VII claim. In that order, the parties and their counsel were directed to meet and confer to calculate the amount of back pay and other benefits owed the plaintiff and to determine whether they could agree on any injunctive relief that might be appropriate. In the ensuing nine months, the parties were unable to agree on all issues. Therefore, on January 25 and 28, 1991, a remedies hearing was held to consider: (1) whether injunctive relief should be ordered; (2) whether the plaintiff should be given a new GM-14 position; (3) whether the plaintiff's back pay calculation should be determined based on a "fully satisfactory" performance rating or some other performance rating; (4) whether prejudgment interest should be awarded; (5) whether the defendant should be required to provide the plaintiff an individual development plan; (6) whether the defendant should be required to reopen Vacancy Announcement MMS-91-004; and (7) attorneys' fees.

I. *Injunctive Relief*.

During the hearing, the parties agreed on the appropriate injunctive relief, and that agreement was read into the record. The parties subsequently added to their agreement and on January 28, 1991, they submitted the final agreement as a consent decree. I incorporate that consent decree as part of this order.

One issue relating to injunctive relief remains unresolved: Whether the defendant should be

ordered to establish mandatory goals and timetables in its Affirmative Action plan. Most of the January 25, 1991, hearing was devoted to that issue. Both parties tried to establish, through statistical evidence, whether Black males are underrepresented at the GS-13, 14 and 15 grade levels at MMS.

Several credible witnesses testified that, at this time, the percentage of Black male accountants at MMS is approximately equal to the percentage of Black male accountants nationally. Plaintiff presented contrary evidence. It appears, however, that MMS has increased Black male representation in upper level accounting positions. Therefore, even if Black males are still underrepresented, MMS has made significant progress in this area. Thus, I find that the plaintiff has not shown that there is currently a pattern or practice of discrimination. Absent such a showing, the plaintiff is not entitled to the extraordinary relief provided by a permanent injunction and that relief is denied. *Drez v. E.R. Squibb & Sons, Inc.*, 674 F. Supp. 1432 (D. Kan. 1987).

II. *New GM-14 Position.*

As a result of my May 29, 1990 order, the plaintiff was retroactively promoted to GS-13, and then to a GM-14. Asserting that his new position is simply his old position with a new title and grade, the plaintiff now seeks a new GM-14 position.

In support of its contention that the plaintiff was given new responsibilities when he was promoted to GM-14, the defendant called Paul Macias, staff assistant to MMS's associate director. Macias developed the plaintiff's new job description and

testified that the plaintiff now has a much broader role in his area of expertise. In addition, Macias testified that it is not unusual for MMS to promote people "in place." I find that the plaintiff was given a retroactive promotion to a GM-14 position, and that position includes new responsibilities. That is all that my May 29, 1990 order required. Therefore, the plaintiff is not entitled to an order from this court requiring the agency to create the new position he now seeks.

III. *Plaintiff's Performance Ratings.*

Throughout the 1980's, the plaintiff was rated as "fully satisfactory." Plaintiff now seeks to have his back pay determined using a higher standard, namely "exceeds fully satisfactory." Plaintiff has not produced any evidence that his ratings were inaccurate, or that the ratings were motivated by anything other than fair evaluation of his performance. Absent credible evidence that his performance ratings were motivated by something other than his performance, I cannot order that those evaluations be changed. Therefore, the back pay calculation shall be made based on the ratings that the plaintiff received, "fully satisfactory."

IV. *Prejudgment Interest.*

Relying on the Back Pay Act (the Act), 5 U.S.C. § 5596, the plaintiff seeks prejudgment interest. Citing *Brown* v. *Secretary of Army*, 918 F.2d 214 (D.C. App. 1990), the defendant asserts that the United States has not waived its sovereign immunity in cases such as this. Although not controlling, *Brown* is directly on point and I therefore adopt its rationale.

In *Brown*, a Black civilian employed by the United States Army claimed that the Army, in violation of Title VII, denied him a promotion based on his race. The trial court ordered that the Army retroactively promote the plaintiff and awarded him back pay, but refused to grant him prejudgment interest.

On appeal, the *Brown* court held "that the Back Pay Act, to the extent of its coverage, waives the federal government's sovereign immunity against prejudgment interest on Title VII back pay awards . . . ." *Id.* at 218. That conclusion, however, does not lead inexorably to the result that the instant plaintiff is entitled to prejudgment interest. Before so concluding, I must determine whether the Act applies. The Act applies only if a federal employee has "been affected by an unjustified or unwarranted personnel action *which has resulted in the withdrawal or reduction of all or part of [his compensation]*." 5 U.S.C. § 5596(b)(1) (emphasis added).

After reviewing the Act's 1978 amendment, the regulations adopted to enforce it, and subsequent cases, the District of Columbia Circuit court concluded that:

> "the 1978 Back Pay Act definitional amendment mean[s] that if an upgrade is mandatory once specified conditions are met, the Act now affords a retrospective remedy. If an upgrade is not of that virtually automatic, noncompetitive kind, the Act affords no relief." *Id.* at 220.

Therefore, if the defendant improperly withheld an automatic upgrade, the plaintiff is entitled to prejudgment interest. If, however, the plaintiff was

improperly denied a competitive upgrade, prejudgment interest is inappropriate.

In his complaint, the plaintiff alleged that he had not been selected for competitively offered positions because (1) he is Black, and (2) to retaliate for his protected EEO activities. Plaintiff did not allege that he should have received these promotions automatically; rather he claimed that the selection process was not fair. I conclude that under *Brown*, the Act does not apply, and therefore the plaintiff is not entitled to prejudgment interest.

V. *Individual Development Plan.*

Plaintiff seeks an order requiring the defendant to prepare for him an individual development plan. He testified that each year he selects training courses that he feels would enable him to continue his professional development. Several credible witnesses testified on behalf of he defendant that, even without such an individual development plan, the plaintiff will receive the training he needs to perform his new job assignment and to continue his professional growth.

Obviously it is in the defendant's best interest to train the plaintiff adequately so that he can perform his job competently and efficiently. Moreover, the plaintiff did not present any evidence that he has not received adequate training in the past. In fact, on direct examination, the plaintiff indicated that recently he had asked permission to attend four courses. Although his request had not yet been granted, he believed that he would be allowed to attend at least some requested courses. Plaintiff has not asserted that other, non-minority employees were allowed to attend every course

requested. I conclude that the plaintiff has not presented sufficient evidence to justify invoking this court's equity powers, and therefore I must decline to order the defendant to provide him an individual development plan.

VI. *Vacancy Announcement MMS-91-004.*

Because the plaintiff was not retroactively promoted to grade 14 until December 30, 1990, he was unable to apply for two grade 15 positions offered in vacancy announcement MMS-91-004. As an additional remedy he asks that I order those positions reopened so that he can apply. Although it is true that the defendant took almost eight months after this court's order to promote the plaintiff to grade 14, there is no evidence suggesting that had he been promoted earlier, he would have secured either position offered. To the contrary, it seems unlikely that the plaintiff would have succeeded.

One criterion used by rating and ranking panels to select a candidate is his or her prior experience. Had the plaintiff been promoted to grade 14 immediately after this court entered judgment on May 29, 1990, he would have been in that job less than six months when the vacancy was announced. Moreover, the successful applicant for both positions must supervise auditors. Plaintiff has done no formal audit work since 1981, and has little if any current experience supervising auditors. Thus, I find and conclude that, the plaintiff would have been a weak candidate, at best, for the positions offered in vacancy announcement MMS-91-004. Therefore, I decline to order the defendant to reopen that vacancy announcement.

VII. *Attorneys' Fees.*

The parties agree that the plaintiff is entitled to attorneys' fees. Defendant asserts that because the plaintiff was represented by two attorneys, there was significant duplication of effort, and therefore the plaintiff's request, $81,716.76 for Mark Bove and $80,811.05 for Richard LaFond is excessive.

Participation in a case by more than one attorney does not always constitute unnecessary duplication of effort. *Probe v. State Teachers' Retirement System*, 780 F.2d 776 (9th Cir. 1986). Indeed, the Government and its agencies are frequently represented in this court by more than one attorney and sometimes more than two. The same is true of private law firms that defend cases of this nature. This case was complicated, difficult and complex, and therefore I find and conclude that it was reasonable, if not imperative, that two attorneys represent the plaintiff.

In *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983), the Tenth Circuit has set out explicit guidelines for determining the appropriate amount of attorneys' fees. "The first step in calculating fee awards is to determine the number of hours reasonably spent by counsel for the party seeking fees." *Id.* at 553. Plaintiff's attorneys kept and have submitted meticulous, contemporaneous time records. The government has produced no evidence or argument to indicate these records are incorrect. After reviewing the records, I find and conclude that the time spent by the plaintiff's attorneys was reasonable.

Next, the court must set a rate of compensation. A private attorney's customary rate is a relevant, but not the conclusive factor. *Id.* at 555. "The hourly rate should be based on the lawyers' skill and experience in civil rights or analogous litigation. . . . The quality of the lawyer's performance in the case should also be considered in placing a value on his or her performance." *Id.* Moreover, "[t]he hourly rate at which compensation is awarded should reflect rates in effect at the time the fee is being established by the court," and should reflect the fee rates of the local area. *Id.*

I have already concluded that this was a complex case. The plaintiff's success evidences the skill with which his attorneys performed. The rate sought by the attorneys varies based on the service performed and the time at which that service took place. I find that the rates sought by the plaintiff's attorneys reflects fair and typical rates that prevailed in the Denver metropolitan area at the time the services were rendered. I therefore conclude that the rates sought are the appropriate rates at which to compensate the plaintiff's attorneys for the hours they spent on this case.[1]

In addition to fees for their own time, the plaintiff's attorneys seek reimbursement of other expenses and fees incurred in pursuing this action. "Items that are normally itemized and billed in

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[1] I note that under *Ramos*, the plaintiff's attorneys might have been entitled to seek the rate they *now* charge. Instead, they very reasonably seek only the rate in effect at the time the services were provided.

addition to the hourly rate should be included in fee allowances in civil rights cases if reasonable in amount." *Ramos*, 713 F.2d at 559. After examining the additional expenses and fees sought by the plaintiff's attorneys, I find and conclude that they are reasonable.

In summary, I conclude that the time spent by each of the plaintiff's attorneys on this case and the rates at which each seeks to be compensated are reasonable.

Accordingly IT IS ORDERED that:

(1) the consent decree filed January 28, 1991, is incorporated by reference and adopted as part of this order;

(2) the clerk shall enter a judgment for back pay in the amount of $68,968.00, plus interest from December 30, 1990;

(3) plaintiff is not entitled to and is not awarded prejudgment interest;

(4) within eleven days, the defendant shall pay Mark S. Bove $81,716.76 in attorneys fees and related expenses, plus interest at the lawful rate from the date of judgment;

(5) within eleven days, the defendant shall pay Richard C. LaFond $80,811.05 in attorneys' fees and related expenses, plus interest at the lawful rate from the date of the judgment; and

(6) Costs of the action are awarded in favor of the prevailing plaintiff and against the defendant.

Dated at Denver, Colorado May 9, 1991.

BY THE COURT:

/s/ Jim R. Carrigan
JIM R. CARRIGAN
UNITED STATES DISTRICT JUDGE